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AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY SPERRY

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

No. CR00-184Z

v.

ORDER

DANTE NARTE,

Defendant.

This matter comes before the Court on defendant Narte's motion to dismiss in light of Apprendi v. New Jersey and its progeny, docket no. 205. The Court has considered defendant Javier's motion to join in defendant Narte's motion to dismiss. The Court hereby GRANTS that motion. The Court has considered defendant Narte's motion for leave to file overlength brief, docket no. 204. The Court hereby GRANTS that motion.

Defendant Narte has pled guilty to count one (1) of the indictment, charging him with knowingly and intentionally conspiring to import and distribute one hundred or more kilograms of marijuana, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), 956, 960 (b)(2)(G) and 963. Defendant Narte has now moved to dismiss the prosecution on the grounds that Apprendi v. New Jersey, 120 S.Ct. 2348 (2000), renders 21 U.S.C. § 841(a) et seq. unconstitutional. The motion, docket no. 205, is DENIED for the reasons stated herein.

ORDER 1-

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1 In Apprendi, the Court held that only facts that increase the penalty for a crime
 2 beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a
 3 reasonable doubt. Apprendi, 120 S.Ct. at 2355. In United States v. Nordby, the Court of
 4 Appeals for the Ninth Circuit held that, under Apprendi, a sentencing judge could not find
 5 facts by a preponderance of the evidence standard at sentencing that increased the statutory
 6 maximum sentence under 21 U.S.C. § 841(a) et seq. United States v. Nordby, 2000 WL
 7 1277211 (9th Cir. 2000).

8 Here, facts necessary to support the conviction and sentence were admitted by
 9 defendant Narte as part of a plea agreement with the government. See plea agreement, docket
 10 no. 95. Therefore, the facts are deemed proven and there is no need to submit them to a jury.
 11 Apprendi is not implicated and the defendant's contention that 21 U.S.C. § 841(a) et seq. is
 12 unconstitutional is without merit. See Doe v. U.S., 2000 WL 1217850, * 3 (D.N.J. 2000);
 13 U.S. v. Walker, 2000 WL 1392758, * 3 (11th Cir. 2000).

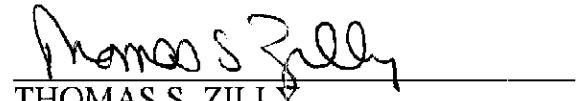
14 Further, defendant contends that his sentence "must be no more than five years." See
 15 Memorandum in Support of Motion to Dismiss, docket no. 205, at 16. However, in the plea
 16 agreement defendant Narte stipulated to the following fact: "Dante Narte and his associates
 17 arranged for and distributed an amount in excess of 100 kilograms of marijuana." See plea
 18 agreement, docket no. 95, ¶ 6. Because defendant Narte has stipulated that "in excess of 100
 19 kilograms of marijuana" was involved in his offense, he is subject to sentencing under 21
 20 U.S.C. § 841(b)(1)(B), establishing a sentencing range of "not less than 5 years and not more
 21 than 40 years." 21 U.S.C. § 841(b)(1)(B)(applicable to "100 kilograms or more of a mixture
 22 or substance containing a detectable amount of marijuana[.]") See Doe v. U.S., 2000 WL
 23 1217850, * 3. Defendant will be sentenced accordingly.

24 In making factual determinations at sentencing, the Court will consider the facts
 25 admitted in the plea agreement together with other evidence having "sufficient indicia of
 26 reliability to support its probable accuracy." United States v. Hopper, 27 F.3d 378, 382 (9th

1 Cir. 1994); United States v. Hernandez-Guardado, 2000 WL 1264596, *9 (9th Cir. Sept. 7,
2 2000) (facts based on presentence report can be relied upon after Apprendi to impose
3 sentencing enhancements under the guidelines.) The Court will apply a preponderance of the
4 evidence standard to determine the amount of marijuana in this case and the applicable
5 guideline range. See United States v. Meshack, 225 F.3d 556 (5th Cir. August 28, 2000)
6 (preponderance standard applies to sentencing enhancement after Apprendi).

7 IT IS SO ORDERED.

8 DATED this 13th day of October, 2000.

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11 THOMAS S. ZILLY
12 UNITED STATES DISTRICT JUDGE
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